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SUPREME COURT, U.S.
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No. 202

In the Supreme Court of the United States

OCTOBER TERM, 1959

FRANK DE SIMONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

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On October 26, 1959, the Court issued the following order:

> In light of the Government's contention that the issues in this case are now moot, the Solicitor General is requested to advise the Court as promptly as possible whether the Government deems (1) the District Court's order of May 29, 1959, which directed petitioner to appear before the grand jury on July 30, 1959, (2) the order to show cause issued by the District Court on May 19, 1959, or (3) the writ of habeas corpus ad testificandum, to be presently outstanding, in that any of the above can possibly hereafter be made the foundation for contempt proceedings against petitioner.

1. In response thereto, the government states that in its view the writ of habeas corpus ad testificandum is not presently and cannot be outstanding since petitioner is not in the custody of the warden to whom the writ is directed. The writ ad testificandum was merely a direction to the warden to produce petitioner, who could not be required to come before the grand jury, of his own volition because he was in jail. Since petitioner is no longer in jail, the writ directed to the warden can serve no function. A writ of habeas corpus, no matter what form it takes, is based on custody. Whatever may be the validity or invalidity of the issues underlying a habeas corpus proceeding, the habeas corpus proceeding itself becomes moot, once custody has terminated. The issues, if any remain, must be litigated in some other proceeding. See *Stallings* v. *Splain*, 253 U.S. 339, 343–344; *Johnson* v. *Hoy*, 227 U.S. 245, 247–248.

2. After petitioner was produced in California, he refused in several appearances to testify before the grand jury. After the Court of Appeals for the Ninth Circuit had entered the order dismissing the appeal, petitioner was ordered by the district court to appear as a witness before the grand jury on May 12. Upon his refusal to testify at such proceeding, an order to show cause why he should not be punished for contempt was issued on May 19, 1959. At the hearing on that motion, the district court, upon being assured by petitioner that he would testify, entered its order of May 29, 1959, directing him to appear before the grand jury on July 30, 1959.

In the meantime, however, petitioner and others had been indicted in the United States District Court for the Southern District of New York for conspiracy to obstruct justice. Because of that indictment he was excused from appearing on July 30 until directed to do so by the government. Petitioner is now on trial under the New York indictment.

Petitioner cannot be held in contempt unless he is directed by the government to appear before the grand jury of the Southern District of California pursuant to the order of May 29, and then refuses to testify at that proceeding. While, technically, the order to show cause and the order of May 29 are still outstanding, in view of petitioner's pending indictment and trial in New York the government will take no action under those orders. The government does not expect to call petitioner at all before this grand jury, but if it should become necessary to do so it will proceed by a new subpoena.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

NOVEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE: 1959